99-5739

No.

ORIGINAL

SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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99-5739
JONES
v
U.S.

QUESTION PRESENTED

Section 844(i), 18 U.S.C., prohibits the arson or attempted arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In this case, the Seventh Circuit, in acknowledged conflict with decisions of the Ninth and Eleventh Circuits, held that the required nexus between the private residence burned in this case and interstate commerce was satisfied by connections the court recognized were insubstantial, including the receipt of natural gas, and the maintenance of a mortgage and homeowners' insurance on the property.

The question presented in this case is whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 844(i) may be constitutionally applied to the arson of real property that is not actively used in any commercial activity and that lacks any substantial connection with interstate commerce.

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Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 14

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United States v. *Five Gambling Devices*, 346 U.S. 441 (1953) 20-21

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United States v. *Hall*, 129 F.3d 1261 (table), 1997 WL 712885 (4th Cir. Nov. 17, 1997), cert. denied, 118 S. Ct. 2331 (1998) 9

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United States v. *Hicks*, 106 F.3d 187 (7th Cir.), cert. denied, 117 S. Ct. 2425 (1997) 18

United States v. *Hinds*, 125 F.3d 849 (table), 1997 WL 636810 (4th Cir. Oct. 15, 1997), cert. denied, 118 S. Ct. 1100 (1998) 9

United States v. *Latouf*, 132 F.3d 320 (6th Cir.), cert. denied, 118 S. Ct. 1542 (1998) 10

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *McGuire*, 178 F.3d 203 (3d Cir. 1999) 16, 17, 19, 20

United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981) 20

United States v. *Nguyen*, 117 F.3d 796 (5th Cir.), cert. denied, 118 S. Ct. 455 (1997) 16

United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) ..... *passim*

United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995) 9

United States v. *Rea*, 169 F.3d 1111 (8th Cir. 1999) 5, 10

United States v. *Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) 4

United States v. *Ryan*, 41 F.3d 361 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995) 19

United States v. *Stillwell*, 900 F.2d 1104 (7th Cir.), cert. denied, 498 U.S. 838 (1990) 18

United States v. *Tocco*, 135 F.3d 116 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998) .. 10

United States v. *Voss*, 787 F.2d 393 (8th Cir.), cert. denied, 479 U.S. 888 (1986) 10

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 23

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18 U.S.C. § 1951(a) 23

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33 C.F.R. §328.3 23

Miscellaneous

Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999 22

AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) 24

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 14

Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) 4, 22

Ellis, Casenote, *A* Lopez *Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. ILL. U. L. REV. 85 (1996) 22

THE FEDERALIST (C. Rossiter ed. 1961) 12

Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States *v.* Lopez, 46 CASE W. RES. L. REV. 695 (1996) 24

Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1 22

Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499 (1996) 24

Jurich, Comment, United States *v.* Lopez: *The Supreme Court Takes a Shot at Congressional Authority Under the Commerce Clause*, 19 HAMLINE L. REV. 229 (1995) 22-23

Kolenc, *Commercial Clause Challenges After* United States *v.* Lopez, 50 FLA. L. REV. 867 (1998) 23

Leasure, *Commerce Clause Challenges Spawned by* United States *v.* Lopez *Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of* Lopez, 50 ME. L. REV. 410 (1998) 22

Lupkes, *Constitutional Law — Federal Commerce Power: Striking Down the Gun Free School Zones Act As Beyond Congressional Power:* United States *v.* Lopez, *115 S. Ct. 1624 (1995)*, 72 N.D. L. REV. 1081 (1996) 22

Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995) 25

Note, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Clause Statute*, 48 WASH. U. J. URB. & CONTEMP. L. 183 (1995) 19

Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151 (1985) 14

Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295 (1986) 14

Rehnquist, *The 1998 Year-End Report on the Federal Judiciary* (1999) 25

Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L. J. 521 (1996) 22

U.S. Census Bureau, *Housing Vacancy Survey*, <http:// www.census.gov/hhes/www/housing/hvs/q299tab5.html> 22

PETITION FOR A WRIT OF CERTIORARI

Dewey J. Jones respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case .

OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 1a-3a) is reported at 178 F.3d 479. The opinion of the district court (App., *infra*, 4a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several states * * * .

Section 844(i), 18 U.S.C., provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * * .

STATEMENT

Petitioner was convicted of a federal crime for setting fire to his cousin's private home, under a statute that federalizes arsons against property "used" in interstate commerce or "used * * * in an activity affecting" interstate commerce. That home was not used in any commercial activity, and the Seventh Circuit conceded that the links between the house and

interstate commerce — a mortgage, homeowners' insurance, and a natural gas hook-up — were insubstantial. Nonetheless, the court of appeals upheld the extension of federal criminal regulation to this non-commercial crime against inherently *intra*state property, grounding its decision on the economic significance of the entire residential real estate market, and of all arsons taken together. That truly sweeping view of federal government's ability to federalize local crimes conflicts with the views of two other courts of appeals.

1. On February 23, 1998, petitioner Dewey Jones visited the Fort Wayne, Indiana, residence of his cousin, James Walker. See 6/17/98 Tr. 35-36, 116-117. Jones earlier had telephoned the house in an unsuccessful effort to speak to Walker. *Id.* at 112-114. When Jones appeared at the Walker residence, he encountered Walker's wife, Lisa; Walker again was not home. *Id.* at 36, 116-117, 159. After telling Mrs. Walker, "I don't have nothing against you or your kids, this is between me and him [*i.e.*, Walker], but he is avoiding me," Jones threw a lit Molotov cocktail into the living room of Walker's residence, causing fire damage. *Id.* at 116-117. He escaped, briefly, in a Ford Explorer driven by another cousin, Jermaine Gist. *Id.* at 117, 147-150.

The arson originally was investigated by the Fort Wayne police and fire departments. 6/17/98 Tr. 33, 50. The fire department notified the federal Bureau of Alcohol, Tobacco, and Firearms, however, which then investigated the matter. *Id.* at 50. As a result of the latter investigation, on March 25, 1998, a federal grand jury returned a three-count indictment charging Jones with arson, 18 U.S.C. § 844(i), using a destructive device during and in relation to a crime of violence punishable as a federal offense (*i.e.*, the arson charged as a

violation of Section 844(i)), 18 U.S.C. § 924(c), and making an illegal destructive device, 26 U.S.C. § 5861(f).

At trial, there was no evidence that the Walkers conducted any business in their house. Instead, the government introduced three items of evidence to prove the jurisdictional element of Section 844(i). First, the mortgage on the Walker residence was held by an out-of-state company (Midland Mortgage of Oklahoma City, Oklahoma). See App., *infra*, 6a. A witness from the mortgage company testified, however, that the company suffered no loss as a result of the fire. See 6/17/98 Tr. 86. Second, natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, which received its gas from outside the state. See App., *infra*, 5a-6a. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. Cf. 6/17/99 Tr. 87-99. Third, the Walker residence was insured by a company with an out-of-state headquarters, which paid the Walkers' insurance claim with a draft from an out-of-state bank. App., *infra*, 6a. The insurer had about 20 employee agents in Fort Wayne, however, and the Walkers' insurance claim was settled by an employee claims adjuster who had authority to settle claims only in Fort Wayne. See 6/17/98 Tr. 75-80.

Before the case was submitted to the jury, Jones moved for acquittal on the Section 844(i) count, contending that the evidence was insufficient to show that the Walker property was used in interstate commerce or in any activity affecting interstate commerce. The district court denied the motion. 6/17/98 Tr. 163-165, 177-179.

2. The jury convicted Jones on all three counts, and the district court denied Jones' post-verdict motion for a judgment of acquittal on the Section 844(i) count and the count under 18 U.S.C. § 924(c).[1] App., *infra*, 4a-8a. The district court determined that, under Seventh Circuit precedent, the government was required to show only "a slight effect on interstate commerce" under Section 844(i). *Id.* at 8a (internal quotation marks omitted). Under that test, the district concluded, "the natural gas connection alone suffices to supply the interstate commerce element." *Id.* at 7a.

Jones was sentenced to 35 years in prison, over the objection of his victim, Walker, that the sentence was excessive and far higher than the sentence Jones would have received in state court. See 8/26/98 Tr. 18-19. The district court agreed that the sentence, which was mandated by statutory minima, was "probably * * * excessive." *Id.* at 21. Cf. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

3. The Seventh Circuit affirmed the conviction. The court of appeals first addressed Jones's argument that, in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the government was required to prove more than a "slight effect" on interstate commerce under Section 844(i). App., *infra*, 2a. The Seventh Circuit noted its disagreement with the Eighth Circuit's conclusion that *Lopez* was "irrelevant to prosecutions under

[1] The Section 924(c) count charged Jones with using and carrying a destructive device "during and in relation to a crime of violence for which [he] may be prosecuted in a court of the United States, arson in violation of 18 U.S.C. § 844(i)." See Indictment, Count Two (in unpaginated C.A. App.). An element of the Section 924(c) offense is an underlying crime of violence "for which the person may be prosecuted in a court of the United States." See *United States* v. *Rodriguez-Moreno*, 119 S. Ct. 1239, 1243 (1999). If the evidence is insufficient to support Jones' conviction under Section 844(i), it is insufficient to support the conviction under Section 924(c).

§ 844(i)." *Id.* at 2a (citing *United States* v. *Rea*, 169 F.3d 1111 (8th Cir. 1999), and *United States* v. *Flaherty*, 76 F.3d 967, 973-74 (8th Cir. 1996)). To the contrary, the Seventh Circuit held that, under *Lopez*, statutes enacted under the commerce power, such as Section 844(i), could reach only activities that "substantially affect commerce." *Ibid.*

The court of appeals then considered whether that standard had been met. The Seventh Circuit acknowledged that the interstate connections proven by the government — out-of-state natural gas, insurance, and mortgage — "are pretty slight for a single building" and "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." App., *infra*, 2a. The court affirmed the conviction, however, finding that the statute was constitutionally applied for two reasons.

First, the Seventh Circuit observed that "the residential housing industry is interstate in character." App., *infra*, 2a. The court explained that "[g]oods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of those." *Ibid.* The court of appeals concluded that this connection between interstate commerce and residential real estate *in toto* was sufficient to render application of Section 844(i) constitutional in this case. *Id.* at 2a-3a.

Second, taking a different approach, the Seventh Circuit pondered "whether 'arson of buildings' or even 'arson of residences' substantially affects commerce," and concluded that "the answer still must be yes." App, *infra*, 3a. The court considered the damage caused by all such arsons taken together, and found that "[i]f even a small fraction of the loss is covered

by interstate insurance markets, the effect is 'substantial.'" *Ibid.* Arsons of residential properties have additional consequences, the court noted: they "affect[] gas, electric, and telephone service, require[] the occupants to stay at hotels while repairs [a]re completed (a sure sign of interstate commerce * * *), [lead] friends and loved ones to travel from other states to give comfort to the victims, and so on." *Ibid.* These collective effects, the court concluded, in tandem with "proof of a slight connection between the particular arson and interstate commerce," were sufficient to permit application of Section 844(i). *Ibid.*

The Seventh Circuit acknowledged that its decision squarely conflicted with decisions of the Ninth and Eleventh Circuits that "have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences." App., *infra*, 2a (citing *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996)).

REASONS FOR GRANTING THE PETITION

For more than four years the federal courts have grappled with the limits on federal power under the Commerce Clause that this Court articulated in *United States* v. *Lopez*, 514 U.S. 549 (1995). One area of particular confusion has been the application of the principles explained in *Lopez* to federal statutes that contain jurisdictional elements. The four justices who dissented in *Lopez* foresaw the "legal uncertainty" about the connection to interstate commerce required for application of Section 844(i) and similar statutes. See *id.* at 630. That

"uncertainty" has ripened into a square conflict among the circuits over the constitutional breadth of Section 844(i), and warrants immediate review by this Court.

As the Seventh Circuit acknowledged, the courts of appeals are deeply divided over whether, consistent with the limits of the commerce power, Section 844(i) may be applied to the arson of residential real property not actively used in business. As this case demonstrates, for some courts analysis under *Lopez* is an empty exercise that permits the Commerce Clause to be used to federalize any crime that, in the aggregate, has substantial costs to the nation. The court of appeals in this case also nullified the limiting effect of the jurisdictional element in the statute. If the constitutional limitations set forth in *Lopez* can be dodged so easily, there is no effective limit on the assertion of federal power. The decision below, and others like it, permit trivial and attenuated effects on interstate commerce to support federal authority over crimes that are fundamentally intrastate — in this case, a crime committed against real property that was not used in business.

The many federal appellate decisions addressing the jurisdictional element of Section 844(i) confirm the exceptional importance of this issue. Moreover, as the Seventh Circuit also noted, in 1997 there were more than 33,000 arsons of buildings, including nearly 14,000 arsons of single-family homes — each one a federal crime according to the decision below. The reasoning of the decision below would appear to authorize a general federal police power over almost any crime affecting property. This Court should grant review to foreclose further circumvention of the limiting principles recognized in *Lopez*.

A. The Circuits Are Divided Over The Constitutionality Of Section 844(i) As Applied To Arson Of Property Not Actively Used In A Commercial Activity

The courts of appeals are sharply divided over whether the Commerce Clause permits application of Section 844(i) to the arson of residential property that is not actively used in a commercial activity. The Seventh Circuit explicitly acknowledged that its decision conflicts with decisions of two other courts of appeals. App., *infra*, 2a (citing *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), and *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996)).

In *Pappadopoulos*, the Ninth Circuit squarely held that the Commerce Clause bars application of Section 844(i) to arson of residential property that is not actively used in some commercial enterprise. By contrast with the Seventh Circuit in this case, the Ninth Circuit held that the government must prove that the wrongful conduct in an individual case had "a 'substantial' effect on or connection to interstate commerce" in order to sustain a conviction under Section 844(i). 64 F.3d at 527. The Ninth Circuit concluded that "the receipt of natural gas * * * from out-of-state sources" was insufficient to show the necessary substantial effect on commerce. *Ibid.*[2] As Chief Judge Wallace explained, "[i]f the Commerce Clause were extended to reach the activity that the government seeks to punish here, we would be 'hard-pressed to posit any activity by an individual that Congress is without power to regulate.'" *Ibid.* (quoting *Lopez*, 514 U.S. at 564).

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[2] See also *United States* v. *Corona*, 108 F.3d 565, 570-571 (5th Cir. 1997) (Higginbotham, J.) ("[W]e doubt that an effect as small as the cessation of natural gas service to a single household" is sufficient under the Commerce Clause to support applying Section 844(i) to arson of the house) (dictum).

The Eleventh Circuit also has rejected application of Section 844(i) to arson of a private residence that was not used in a business. See *United States* v. *Denalli*, 73 F.3d 328 (11th Cir.), modified on other grounds, 90 F.3d 444 (1996). Relying on *Pappadopoulos*, the Eleventh Circuit held that "*Lopez* required the government to prove that the destruction of [the particular residence] had a substantial effect on interstate commerce" in order to satisfy the interstate commerce element of Section 844(i). *Id.* at 330. In *Denalli*, the Eleventh Circuit rejected the government's effort to establish a nexus with interstate commerce by proving that the owner of the residence, an engineer for a company engaged in interstate commerce, occasionally used his home computer for work purposes. *Id.* at 329-331.

By contrast, the Fourth Circuit has agreed with the Seventh Circuit that Section 844(i) may be constitutionally applied to arson of property that is not actively used in any commercial activity. See *United States* v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995). The Fourth Circuit held that Section 844(i) could encompass the fire-bombing of a trailer home because the trailer received electricity from an interstate power grid. *Id.* at 607. Although the decision in *Ramey* preceded this Court's decision in *Lopez*, the Fourth Circuit has relied upon *Ramey* in summarily dismissing constitutional challenges to the application of Section 844(i) after *Lopez*. See, *e.g.*, *United States* v. *Hall*, 129 F.3d 1261 (table), 1997 WL 712885, at *2 (4th Cir. Nov. 17, 1997), cert. denied, 118 S. Ct. 2331 (1998); *United States* v. *Hinds*, 125 F.3d 849 (table), 1997 WL 636810, at *1 (4th Cir. Oct. 15, 1997), cert. denied, 118 S. Ct. 1100 (1998).

As the Seventh Circuit noted in the decision below (App., *infra,* 2a), the Eighth Circuit has held that *Lopez* does not affect the analysis of the constitutional application of Section 844(i) because that statute has an explicit jurisdictional element; thus, in that court's view, a *de minimis* connection with commerce is sufficient. *United States* v. *Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999).[3] The Second Circuit agrees. See *United States* v. *Tocco*, 135 F.3d 116, 123-124 (2d Cir.), cert. denied, 118 S. Ct. 1581 (1998). By contrast, at least three other circuits agree with the decision below and have applied some version of the "substantial effect" analysis mandated by *Lopez* to Section 844(i). See *Pappadopoulos*, 64 F.3d at 526; *Denalli*, 73 F.3d at 330; *United States* v. *Latouf*, 132 F.3d 320, 325-327 (6th Cir.), cert. denied, 118 S. Ct. 1542 (1998). By reviewing the present case this Court could resolve this additional conflict among the circuits on the applicability of the *Lopez* analysis to Section 844(i) and other federal criminal statutes that contain jurisdictional elements.

In sum, the courts of appeals are deeply divided over whether application of Section 844(i) to the arson of a private residence not being actively used in commerce extends the statute beyond constitutional bounds. The conflict in the circuits is not surprising; as five Justices of this Court have recognized, the *Lopez* decision raises serious questions about the permissible scope of Section 844(i). See *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.); *Ramey* v. *United States*, 514 U.S. 1103 (1995)

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[3] Significantly, however, the Eighth Circuit recognized that insurance coverage from an interstate insurer could not by itself establish even a *de minimis* basis under the Commerce Clause for the application of Section 844(i) to a residence. See *Rea*, 169 F.3d at 1113 (citing *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir.), cert. denied, 479 U.S. 888 (1986)).

(Scalia, J., dissenting from denial of certiorari in *Ramey*, *supra*). See also *United States* v. *Corona*, 108 F.3d 565 (5th Cir. 1997) ("*Lopez* calls into question a family of cases interpreting § 844(i)."). This Court should grant review to resolve this fully ripened conflict.

B. The Seventh Circuit's Decision Expands The Scope Of Section 844(i) Beyond Constitutional Bounds

Further review is warranted for the additional reason that the Seventh Circuit's decision expands the reach of Section 844(i) beyond what the Commerce Clause permits. The court of appeals fundamentally misinterpreted this Court's decision in *Lopez*, and created a loophole in Commerce Clause analysis that would permit the federal government to exercise virtually plenary police power over any intrastate property crime — or, for that matter, over almost any conduct affecting any building. Contrary to the Seventh Circuit's suggestion, the limitations of the commerce power require closer scrutiny of the connections between interstate commerce and any activity that Congress endeavors to make into a federal crime. Moreover, the jurisdictional element in Section 844(i) itself must receive an interpretation that accords both with its text and with the principles set forth in *Lopez*.

1. This Court has repeatedly recognized that, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993), and *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). Although the States can legislate in any field, the "Constitution * * * withhold[s] from Congress a plenary police power." *Id.* at 566. Thus, federal legislation — especially federal criminal legislation, which trenches on an area "where States historically have been sovereign" (*id.* at 564) — must be firmly rooted in one of the "few and defined"

powers enumerated in the Constitution. *Id.* at 552 (quoting THE FEDERALIST No. 45, at 292-293 (C. Rossiter ed. 1961)).

From the earliest days of the Republic, it has been "clear[] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). The Commerce Clause empowers Congress to regulate interstate and foreign commerce, and that regulation may include criminal proscriptions and penalties. But the commerce power, although broad within its defined sphere, "is subject to outer limits." *Lopez*, 514 U.S. at 557. In *Lopez*, this Court "identified three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that ***substantially affect*** interstate commerce." *Id.* at 558-559 (emphasis added).

The Seventh Circuit recognized (App., *infra*, 2a) that application of Section 844(i) in this case can be justified, if at all, only as a regulation of an activity that "substantially affect[s]" interstate commerce. The court of appeals also acknowledged that the interstate connections proved at Jones's trial "don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Ibid.* The Seventh Circuit concluded, however, that Section 844(i) could be applied even to arsons that had "pretty slight" (*ibid.*) — indeed, trivial — effects on interstate commerce. The court of appeals believed that it could disregard the insubstantiality of the particular arson's connections with interstate commerce because the "residential housing industry is interstate in character" and because

the "collective effect" on interstate commerce of "arson of buildings" or "arson of residences" is substantial. See *id.* at 3a.

But the commerce power does not authorize this kind of bootstrapping by aggregation when the starting point — the activity regulated — is not commercial at all. To the contrary, "the *de minimis* character of individual instances arising under [a statute enacted under the commerce power] is of no consequence" ***only*** "where *a general regulatory statute bears a substantial relation to commerce*." *Lopez*, 514 U.S. at 558 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). Section 844(i), however, is not "an essential part of" any such "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity" — *i.e.*, arson — were regulated. *Id.* at 561.

The Seventh Circuit held that Section 844(i) could pass constitutional muster in part because, in that court's view, "the residential housing industry is interstate in character." App., *infra*, 2a. But that has nothing to do with the constitutionality of Section 844(i), which is not part of a scheme to regulate the "residential housing industry." If an arson prohibition may be justified by the "interstate * * * character" of the "residential housing industry," so could nationwide zoning regulations (limited, perhaps, to structures that received utilities from interstate systems). That cannot be possible under the Commerce Clause.

The commerce power does authorize "regulation[] of [intrastate] activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. But the effects of arson cannot be aggregated for purposes of constitutional analysis for a simple reason. Arson

cannot characterized as an activity that "arise[s] out of or [is] connected with a commercial transaction" (*ibid.*) that, although intrastate, has a discernible and definable connection with an interstate market or other interstate commercial process.

Simple arson "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Ibid.* See *Pappadopoulos*, 64 F.3d at 526 (arson of a private residence "is not commercial or economic in nature"). Burning a building does not involve any economic transaction or exchange. See *Lopez*, 514 U.S. at 559, 561. Cf. *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). Arson also does not involve the manufacture or production of an economically valuable commodity. See *Lopez*, 514 U.S. at 559-560. Cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). And because one arson generally bears no economic relation to another, Section 844(i) not only "is not a regulation of any relevant economic market," but there are no "other rational connections among nationwide [arsons] that would entitle Congress to make federal crimes of them all." *United States* v. *Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (en banc affirmance by an equally divided court) (Higginbotham, J., dissenting).

To the contrary, arson falls within the heartland of traditional "criminal law enforcement," an area in which "States have historically been sovereign."[4] *Lopez*, 514 U.S. at 564.

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[4] Arson has been recognized as a common law crime since before the Norman Invasion, see 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 222 (1769), and has been criminalized by the States "[f]rom the earliest colonial days." Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 AM. CRIM. L. REV. 151, 151 (1985). See generally Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295 (1986).

Arson surely is "an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Id.* at 583 (Kennedy, J., concurring). If arson is a "commercial" activity, it is difficult to imagine any property crime that is not.

The Seventh Circuit's reliance (App., *infra*, 3a) on the nationwide cost of "arson of buildings" or "arson of residences" as a means of conjuring up a substantial aggregate effect on interstate commerce is another form of the generalized "'costs of crime' reasoning" that this Court rejected in *Lopez*. 514 U.S. at 564. Relying solely on the aggregated costs of crime — or a type of crime — to render the application of a federal criminal statute constitutional under the Commerce Clause would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. Many varieties of local crimes, when aggregated, have significant economic effects; that is precisely *why* the effects on interstate commerce of garden-variety, independent criminal acts of one kind or another can *not* be aggregated to prop up a federal criminal statute. See *Hickman*, 179 F.3d at 233 (Higginbotham, J., dissenting) ("individual acts cannot be aggregated if their effects on commerce are causally independent of one another"). Promiscuous use of aggregation analysis in such circumstances would permit federal regulation of "truly local" matters. *Lopez*, 514 U.S. at 568.

2. This Court has explained how Congress can use the commerce power to regulate activity, such as arson, that lacks a substantial, interdependent effect on interstate commerce across the board. When the effects of an activity on interstate commerce cannot properly be aggregated for the purpose of Commerce Clause analysis, Congress may alleviate potential

constitutional problems in a statute by "limit[ing] its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561.

This Court did not suggest that the mere inclusion of a jurisdictional element in a statute would permit Congress to regulate outside the three categories of activity within the scope of the Commerce Clause. Thus, "[a] jurisdictional element by itself cannot save a statute that exceeds congressional authority." *Hickman*, 179 F.3d at 240 (Higginbotham, J., dissenting). Rather, the Court assumed that the jurisdictional element "would ensure, ***through case-by-case inquiry***," that particular instances of the regulated activity ***did*** fall within Congress's commerce power. See *Lopez*, 514 U.S. at 561-562 (emphasis added). That is, where channels or instrumentalities of commerce are not at issue, the construction and application of the jurisdictional element should ensure that the activity regulated in fact "substantially affects" interstate commerce. See *id.* at 559.

As Chief Judge Wallace has explained, this case-by-case inquiry must be applied to Section 844(i), and thus "the government must satisfy the jurisdictional requirement by pointing to a 'substantial' effect on or connection to interstate commerce" in the "individual case[]." *Pappadopoulos*, 64 F.3d at 527.[5] To serve the proper screening function, "[t]he

[5] See also *United States* v. *Corona*, 108 F.3d 565, 569-571 (5th Cir. 1997) (Higginbotham, J.) (finding that particular arson of taxicab warehouse had substantial effect); *United States* v. *Nguyen*, 117 F.3d 796, 799 (5th Cir.) (Edith Jones, J., dissenting) (advocating analysis of actual or intended effect of arson on commercial activity conducted at target property), cert. denied, 118 S. Ct. 455 (1997) . Cf. *United States* v. *McGuire*, 178 F.3d 203, 209, 212 n.10 (3d Cir. 1999) (*Lopez* requires case-by-case jurisdictional analysis under Section 844(i), but not necessarily proof "that a particular use has a 'substantial' effect on interstate commerce").

jurisdictional element must in some way be meaningful." *Hickman*, 179 F.3d at 240 (Higginbotham, J., dissenting). The "substantial effect" perhaps need not be *quantitatively* large in every case so long as *qualitatively* the effect is closely connected to commerce and to the proscribed or regulated activity. But transparently insubstantial connections with commerce — such as the passive receipt of utility service, or the existence of a mortgage or insurance — will not do.

The Seventh Circuit nonetheless concluded that such concededly "slight" links between the burned property and commerce — trivial links, under any reasoned analysis — sufficed to bring Jones' arson within the constitutional scope of the statute. App., *infra*, 3a. If a *slight* connection is enough, however, then Congress could regulate not only every arson, but every (or nearly every) property crime of any kind. The same rationale would permit plenary federal power in other areas. After all, almost every act in modern life has at least a "slight connection" (*ibid.*) to interstate commerce:

> [D]riving a few blocks to pick up one's children (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars), have an indirect effect on interstate, and often foreign commerce.

United States v. *McGuire*, 178 F.3d 203, 210 (3d Cir. 1999).

The Seventh Circuit's *de minimis* approach — which to a significant extent is a pre-*Lopez* Commerce Clause analysis in which *any* effect, substantial or not, suffices to confer federal jurisdiction — nullifies the winnowing function that a jurisdictional element must serve to render an application of a statute constitutional. As interpreted by the Seventh

Circuit, the jurisdictional element of Section 844(i) simply does not "limit" Section 844(i)'s "reach to a discrete set" of arsons "that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

3. In seeking out attenuated connections to interstate commerce that might justify applying Section 844(i) in this case, the Seventh Circuit also disregarded — or, what is the same thing, interpreted into nullity — the specific connections to interstate commerce that Congress identified as necessary in any particular prosecution under the statute. The Seventh Circuit equated the "proof of a small effect" on commerce that, it believed, would "satisfy the statute" (App., *infra*, 2a) with the "proof of a slight connection between the particular arson and interstate commerce" that, in the court's view, would "permit[] the national government to establish substantive rules of conduct" (*id.* at 3a). In doing so, the Seventh Circuit followed established circuit precedent equating the analysis of the jurisdictional element of the statute with analysis under the Commerce Clause. See, *e.g.*, *United States* v. *Hicks*, 106 F.3d 187, 190 (7th Cir.), cert. denied, 117 S. Ct. 2425 (1997); *United States* v. *Stillwell*, 900 F.2d 1104, 1109-1110 (7th Cir.), cert. denied, 498 U.S. 838 (1990).

That reasoning misuses the statement in *Russell* v. *United States* that "[t]he legislative history indicates that Congress intended to exercise its full power to protect 'business property.'" 471 U.S. 858, 860 (1985). For some courts of appeals, this Court's observation has become a basis for extending Section 844(i) to arsons of property that a court decides have *any* tenuous connection with interstate commerce that might render application of the statute constitutional under a *de minimis* test. See, *e.g.*, *Hicks*, 106 F.3d at 190.

But as this Court pointed out in *Russell*, whatever the scope of Congress's power to enact anti-arson legislation, "[b]y its terms, * * * the statute only applies to property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862. Congress thus narrowed the field of connections with interstate commerce that may make the application of *this* statute constitutional (or may fail to do so). Courts can no more use constitutional theory to broaden a statute beyond its text than they can permit a statute to exceed the limits of congressional power. Congress exercises the commerce power only through legislation, not through legislative history and certainly not through judicial decisions.

Whether the required connection between a specific arson and interstate commerce must itself be "substantial," or instead may meet some lesser but non-trivial standard, cf. *McGuire*, 178 F.3d at 211 n.7, 212 n.10, the effect on commerce must be discernible from the building's "use" in an "activity affecting" interstate commerce. The ordinary or natural meaning of "use" is "active employment." See *Bailey* v. *United States*, 516 U.S. 137, 143, 145 (1995). There is no indication in the text or legislative history of Section 844(i) that Congress intended "use" in Section 844(i) to mean anything else. To the contrary, both the text and history of the statute suggests that Congress intended to invoke the commerce power to protect property — primarily business property — actively used in a commercial activity or to perform a commercial function.[6]

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[6] See *Russell*, 471 U.S. at 860-862; *United States* v. *Ryan*, 41 F.3d 361, 369-370 (8th Cir. 1994) (en banc) (Richard Arnold, C.J., concurring in part and dissenting in part), cert. denied, 514 U.S. 1082 (1995); Note, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Clause Statute*, 48 WASH. U. J. URB. & CONTEMP. L. 183, 209 (1995) (Section 844(i)'s reference to "use" "limits the statute's broad 'affecting interstate commerce' language" and requires an inquiry into the "property's function"). The legislative

The Seventh Circuit's conclusion that Jones committed arson of a property "used" in an activity affecting interstate commerce cannot be reconciled with the plain meaning of the statute. Under any reasonable interpretation of the term "use," the owner of a residence does not "use" the structure when she receives natural gas, or secures or pays for a mortgage or homeowners' insurance. To "use" a structure in an activity affecting commerce implies some "action and implementation" involving the structure in commercial activity, *Bailey*, 516 U.S. at 145, not the passive immersion in a modern economy that is all the Seventh Circuit could rely on here. As Judge Friendly long ago explained for the Second Circuit, to interpret Section 844(i) to reach a private residence based on such matters would effectively read the word "used" out of the statute. See *United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981).

It would make no sense to "require[] Congress to include a jurisdictional element" if courts were free to "interpret the resulting statutes in such a way as to remove it." *McGuire*, 178 F.3d at 212. But that is what the Seventh Circuit did here. Under no meaningful analysis could the slight, concededly insubstantial interstate connections proved in this case support an application of Section 844(i) that would be consistent with the limits on the commerce power or with the terms of the statute. Far from "construe[ing] a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative," *Lopez*, 514 U.S. at 562 (quoting *United States* v. *Five Gambling*

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history indicates that Congress did intend that Section 844(i) apply to police stations, churches, and synagogues. *Russell*, 471 U.S. at 862 n.6. Congress unquestionably was concerned with the public use of these buildings, although it might be debated whether those uses in every case encompass an activity that substantially affects interstate commerce.

Devices, 346 U.S. 441, 448 (1953) (plurality opinion)), the Seventh Circuit deprived the jurisdictional element of meaning in a way that makes resolution of the underlying constitutional question necessary.

By eviscerating the explicit jurisdictional element in the statute, the Seventh Circuit prevented that element from performing its constitutional function — to "limit [the] reach" of Section 844(i) "to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. That aspect of the Seventh Circuit's decision, like the other aspects discussed above, obliterates the "distinction between what is truly national and what is truly local." 514 U.S. at 567-568. The decision therefore warrants further review by this Court.

C. The Issue Presented Is Recurring And Of Great Practical Importance

The conflict among the circuits over Section 844(i)'s constitutional reach is of great practical and doctrinal significance. Section 844(i) itself is an important part of the burgeoning federal criminal code, and is the subject of frequent litigation in the federal courts. In addition, many other federal criminal statutes contain similar jurisdictional elements. A decision in this case would provide guidance to the lower courts that, after *Lopez*, must interpret jurisdictional elements like those in Section 844(i) to provide their critical and constitutionally compelled limiting function. That is particularly important as federal criminal legislation increasingly encroaches on the prerogatives of the States. Resolving the issue that has divided the courts of appeals would give the Court the opportunity to provide uniformity in this aspect of the "sensitive relation between federal

and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted).

1. As the depth of the conflict among the circuits demonstrates, the federal courts frequently must define the constitutional scope of Section 844(i). The recurrence of the issue is not surprising. In 1997 alone, the FBI reported that there were 13,692 arsons of single-family residential properties nationwide in 1997. See App., *infra*, 3a. Nationwide home-ownership patterns suggest that approximately two-thirds of these residences were privately owned. See U.S. Census Bureau, *Housing Vacancy Survey*, <http:// www.census.gov/hhes/ www/housing/hvs/q299tab5.html>. If not resolved here, the question presented in this petition will recur regularly in the federal courts, with the outcome in each case depending on the location of the courthouse.

2. The constitutional scope of Section 844(i) in light of *Lopez* not only is an exceptionally frequent subject of litigation, but the issue has drawn considerable scholarly attention.[7] By and large, these commentators recognize what the conflict among the circuits

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[7] See, *e.g.*, Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 18 (1999); Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1, 14-15; Leasure, *Commerce Clause Challenges Spawned by* United States *v.* Lopez *Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of* Lopez, 50 ME. L. REV. 410, 412-413 & n. 22 (1998); Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 665-667 (1997); Ellis, Casenote, *A* Lopez *Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. ILL. U. L. REV. 85, 85-86, 108-114 (1996); Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L. J. 521, 527-528 (1996); Lupkes, *Constitutional Law — Federal Commerce Power: Striking Down the Gun Free School Zones Act As Beyond Congressional Power:* United States *v.* Lopez, *115 S. Ct. 1624 (1995)*, 72 N.D. L. REV. 1081, 1097 (1996); Jurich, Comment, United States *v.* Lopez: *The Supreme Court Takes a Shot at Congressional Authority Under the Commerce Clause*, 19

makes crystal clear: that the decision in *Lopez* created substantial confusion about the permissible scope of Section 844(i), and that "judicial upheaval" has resulted. Kolenc, *Commercial Clause Challenges After* United States *v.* Lopez, 50 FLA. L. REV. 867, 884 (1998).

3. In addition, the issue of the constitutional reach of Section 844(i) has broad-ranging implications for the numerous federal statutes that contain identical or similar jurisdictional elements. Federal firearms statutes, for example, prohibit the possession "in or affecting commerce" of firearms or ammunition. See 18 U.S.C. § 922(g)(1), (8), (9). The Hobbs Act prohibits the use of robbery or extortion to "obstruct[], delay[], or affect[] commerce." 18 U.S.C. § 1951(a). The federal money-laundering statute criminalizes financial transactions involving knowing use of unlawfully obtained funds if the transaction "in any way or degree affects interstate or foreign commerce." 18 U.S.C. § 1956. In addition, regulations implementing the Clean Water Act construe that statute to prohibit the discharge of pollutants into all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3 (construing 33 U.S.C. § 1311).[8] Resolution of the question could affect the application of these statutes, and many, many others.[9]

HAMLINE L. REV. 229, 266 n.304 (1995).

[8] Indeed, the Fourth Circuit has struck down this regulation, noting that it "would appear to exceed congressional authority under the Commerce Clause." *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

[9] See, *e.g.*, 15 U.S.C. § 1173(a)(1) (requiring registration of "any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way

4. Finally, the question presented in this case is exceptionally important because the federalization of criminal law is accelerating not merely through new statutes, but through "remarkably expansive" applications of the jurisdictional elements in the statutes that exist. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States *v.* Lopez, 46 CASE W. RES. L. REV. 695, 701 (1996). "Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime," largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters." Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996). See AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7-12 (1998).

Congress continues to press against constitutional boundaries in its lawmaking in this area, a matter of some considerable concern to the judiciary as the criminal caseload of the

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affect interstate or foreign commerce"); 15 U.S.C. § 1245(a) (banning possession, manufacture, sale, or importation "in or affecting interstate commerce" of ballistic knife); 18 U.S.C. § 247 (barring damage of religious real property or intentional obstruction of free exercise of religious beliefs if the offense "is in or affects interstate * * * commerce"); 18 U.S.C. § 513 (prohibiting possession, creation, or transfer of counterfeited security of an entity "which operates in or the activities of which affect interstate * * * commerce"); 18 U.S.C. § 668 (criminalizing theft of certain property from "an organized and permanent institution, the activities of which affect interstate * * * commerce"); 18 U.S.C. § 1028 (criminalizing possession, production, or transfer of false identification document which "is in or affects interstate * * * commerce"); 18 U.S.C. § 1365 (criminalizing tampering with "any consumer product that affects interstate * * * commerce"); 18 U.S.C. § 1962 (prohibiting the use of income derived from a pattern of racketeering or collection of an unlawful debt for investment in an enterprise "the activities of which affect [] interstate * * * commerce"); 18 U.S.C. § 2710 (barring wrongful disclosure of rental or sale records by any person "engaged in the business [or renting or selling videotapes], in or affecting interstate * * * commerce"); 21 U.S.C. § 854 (a) (barring investment of drug profits in any enterprise "the activities of which affect interstate * * * commerce").

federal courts has more than doubled since 1980. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999). Indeed, the federalization of crime "threatens to change entirely the nature of our federal system." Rehnquist, *supra*, at 4. Federal courts that do not enforce the limits of the Commerce Clause, and do not apply federal criminal statutes in light of those limits, exacerbate these deleterious effects on the "sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. The adverse effect of such judicial acquiescence in unconstitutional extensions of federal power is one that review by this Court can fully remediate.

* * * * *

This case does not concern whether arson of a private residence should be a criminal offense. Had the federal government not asserted jurisdiction in this case, petitioner no doubt would have been prosecuted by the state authorities that arrested him. The decision below threatens to "obliterate the distinction between what is national and what is local," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring), however, and thus cannot be squared with fundamental principles of limited federal power. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES of America, Plaintiff–Appellee,

v.

Dewey J. JONES, Defendant–Appellant.

No. 98–3255.

United States Court of Appeals, Seventh Circuit.

Argued April 27, 1999.

Decided May 17, 1999.

Defendant was convicted by jury in the United States District Court for the Northern District of Indiana, William C. Lee, Chief Judge, of arson, making illegal destructive device, and using destructive device during and in relation to crime of violence. Defendant appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that federal arson statute did not exceed Congress' power under Commerce Clause when applied to destruction of residence.

Affirmed.

Commerce ⇐82.6

Federal arson statute did not exceed Congress' power under Commerce Clause when applied to destruction of residence, rather than commercial establishment, inasmuch as statute required proof of some connection between particular arson at issue and interstate commerce, while collective effect of arsons of buildings, or even arsons of residences, established requisite substantial effect on commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 844(i).

David H. Miller (argued), Tina L. Nommay, Office of the United States Attorney, Fort Wayne, IN, for Plaintiff–Appellee.

Richard H. Morgan (argued), Pontiac, MI, for Defendant–Appellant.

Before ESCHBACH, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dewey Jones tossed a Molotov cocktail into his cousin's living room; fire severely damaged the home. A jury convicted Jones of arson, 18 U.S.C. § 844(i), making an illegal destructive device (the firebomb), 26 U.S.C. § 5861(f), and using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c). His appeal challenges only one of these three convictions. Jones contends that § 844(i) exceeds Congress's power under the Commerce Clause (Art. I § 8 cl. 3)

when applied to the destruction of a residence rather than a commercial establishment.

This is a tough row to hoe, and not only because the court has rejected the argument before. *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.1990). Section 844(i) requires proof that the torched property was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce". If this is proved, then an adequate connection to interstate commerce is established. So the eighth circuit held in *United States v. Rea*, 169 F.3d 1111 (8th Cir.1999), and *United States v. Flaherty*, 76 F.3d 967, 973–74 (8th Cir.1996), in the course of declaring *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), irrelevant to prosecutions under § 844(i). But it is difficult to dispatch the constitutional objection quite this easily. *Lopez* says that the power of Congress is limited to activities that substantially affect commerce, 514 U.S. at 559, 115 S.Ct. 1624, while proof of a small effect will satisfy the statute. In this case the jury was entitled to conclude that the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer. Purchases of gas would diminish while reconstruction occurred, and perhaps the arson would affect repayment of the loan. But these interstate connections are pretty slight for a single building; they don't establish a "substantial" connection between this arson (or this residence) and interstate commerce. So the jury's finding is not necessarily sufficient; and the fact that *Lopez* postdates *Stillwell* means that we cannot rest content with a citation to that case.

Two circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences. Compare *United States v. Serang*, 156 F.3d 910 (9th Cir. 1998) (commercial), with *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.1995) (residential); compare *United States v. Grimes*, 142 F.3d 1342 (11th Cir.1998) (commercial), with *United States v. Denalli*, 73 F.3d 328 (11th Cir.) (residential), modified on other grounds, 90 F.3d 444 (1996). Jones wants us to follow these decisions. A prior decision declining to do so, *United States v. Hicks*, 106 F.3d 187 (7th Cir.1997), involved a commercial establishment; our statement that there is no constitutional line between commercial and residential property was dictum, Jones insists.

No, it was not dictum. *Hicks* analyzed the scope of national power under the commerce clause and observed that, after *Lopez*, any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these. This was the background for our statement that "[t]he noncommercial character of the torched building strikes us as irrelevant. The supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern.... The statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn't be a large effect, since the sum of many small effects can be a large effect.... Categories such as private residence and rental apartment building do not appear in the commerce clause or the arson statute; nor is there anywhere else in the law to look for guidance as to how finely to categorize the types of property that might be damaged or destroyed by arson. Categorize finely enough and the interstate effects evaporate and the statute is nullified." 106 F.3d

at 189–90. This was why the defendant in *Hicks* was wrong to argue that a substantial effect on commerce had to be established from his particular arson; or from arsons of commercial buildings in Portage, Wisconsin; or from arsons of commercial buildings generally. "Arsons of buildings" substantially affect interstate commerce; that holding of *Hicks* applies to Jones's arson of a residential structure in Indiana just as it applied to Hicks's arson of a commercial structure in Wisconsin.

None of the arguments offered in this case, or by *Pappadopoulos* or *Denalli*, persuades us that *Hicks* or *Stillwell* is wrong. Cases such as *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), conclude that residential property in the aggregate substantially affects interstate commerce. *McLain* holds that an agreement among a few brokers to fix commissions on sales of residential property in New Orleans thus is within the commerce power. See also, e.g., *Goldfarb v. Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (attorneys' agreement on fees for residential real estate title searches is within commerce power); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (exclusion of a single physician from one hospital is within the commerce power because the provision of health care in the aggregate significantly affects commerce).

If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997, the most recent year for which complete data are available. *Uniform Crime Reports 1997* Table 2.32 (1998). Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential (13,692 single-family dwellings and 6,196 multi-family residences). The damage was a little more than $14,000 per residential arson. *Id.* at Table 2.34. That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas, electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	1:98-CR-16
	)	
DEWEY J. JONES	)	

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998. The government responded to that motion on June 26, 1998. For the following reasons, the motion will be denied.

Discussion

On March 25, 1998, a three count indictment was returned in the above-entitled cause. The charges in the indictment stem from the firebombing of a residential home on Marcy Lane in Fort Wayne, Indiana on February 23, 1998. Count 1 specifically alleged that defendants Dewey J. Jones and Jermaine M. Gist "maliciously damaged and destroyed and attempted to damage and destroy by means of fire and explosive material, real property...used in interstate commerce and in any [sic] activity affecting interstate commerce" in violation of 18 U.S.C. § 844(i) and that they aided and abetted in the same in violation of 18 U.S.C. § 2. Count 2 alleged that both defendants knowingly used or carried a firearm during and in relation to a crime of violence, also in violation of the above statutes. Count 3 alleged that defendant Jones knowingly made a firearm without complying with federal requirements in violation of 28 U.S.C. § 5861(f).

Defendants were tried before a jury commencing on June 17, 1998. At the close of the government's case, this Court entered a judgment of acquittal in favor of defendant Gist. On

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June 17, 1998, the jury returned a verdicts of guilty on all counts with respect to defendant Jones.[1]/

The present motion is directed towards counts one and two. It is defendant 's position that the government failed to establish that the real property was used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce and hence the government failed to prove an essential element for both of those counts.[2]/

A motion for acquittal may not be granted if, viewing the evidence in the light most favorable to the prosecution, there is relevant evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *United States .v Reed*, 875 F.2d 107, 111 (7th Cir. 1989); *United States v. Pope*, 739 F.2d 289, 291 (7th Cir. 1984). In applying this standard, it is incumbent upon the court to recognize that it is the jury which has the exclusive authority to assess the witnesses' credibility, resolve evidentiary conflicts and draw reasonable inferences from the evidence presented. *Reed, supra* at 111. "The test that the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt." *United States v. Weed*, 689 F.2d 752 (7th Cir. 1982).

The government's evidence at trial tended establish an interstate connection based upon three things: natural gas being supplied to the residence at 2610 Marcy Lane; an insurance claim which was paid by an out-of-state insurer; and mortgage payments which were being paid out-of-state. Briefly, the evidence was as follows:

→Northern Indiana Public Service Company (NIPSCO) supplied

---

[1]/ Since defendant Jones is the only defendant remaining, hereinafter he will be referred to simply as defendant.

[2]/ A similar argument was raised by both defendants in motions to dismiss. This Court denied those motions by order dated May 19, 1998.

> natural gas to the residence on the date of the firebombing. NIPSCO gets its gas from outside of Indiana, generally from Texas or Louisiana or Canadian provinces.
>
> →Midland Mortgage Company had a mortgage on the residence. Monthly mortgage payments were made to Midland in Oklahoma City, Oklahoma. From those payments, insurance premiums were paid annually to American Family Insurance in Indiana.
>
> →American Family Insurance had homeowner's insurance coverage on the house. Its home office is in Madison, Wisconsin and drafts for claims made on the policy (one was made here) are paid via the company's bank in Madison.

It is the government's position that such evidence adequately provided the interstate commerce connection.

In his motion for judgment of acquittal, defendant asserts that the damaged real estate, a private residence, was not shown to have been a part of interstate commerce. With respect to each of the connections sought to be established by the government, the defendant argues:

> "Two representatives from NIPSCO Industries, the parent corporation, testified that this private residence received natural gas from NIPSCO, a subsidiary doing business in Indiana. Both NIPSCO corporations are Indiana Corporations and regulated by the Indiana Regulatory Commission. However, no one from NIPSCO testified that the intrastate services received from NIPSCO Industries or NIPSCO, Inc. were affected in any way as a result of this fire. No one testified that the natural gas lines were damaged in any manner. No one testified that the natural gas services were even turned off as a result of this fire. Finally, no one from NIPSCO testified that they even lost any business whatsoever as a result of this fire.
>
> "As to the Mortgage holder, Midland Mortgage Company, its representative testified that it suffered no loss as a result of this fire. Further, no one, including the Midland Mortgage representative, testified that Midland Mortgage was affected in any manner.
>
> "As to American Family Insurance, the insurance company has 18 to 20 agents in Fort Wayne, Indiana. The insurance company has its own 'Claims office' in Fort Wayne which handled the claim as a

> result of this fire. While the claims agent testified that the settlement 'draft' was written by its out of state bank, the agent did not even know the name of the bank. Further, the agent admitted that this bank may in fact do business in Indiana. No copy of the draft was admitted into evidence. no copy of the canceled check allegedly used to pay this claim was ever introduced into evidence. No evidence was introduced as to where the Walker's did their own banking. For all we know, this was an 'intra-bank' transaction occurring in Fort Wayne, Indiana, with a Fort Wayne, Indiana bank.

(Rec. 59, pp 4-5).

While defendant has raised interesting arguments with respect to the amount of evidence required to prove the interstate commerce nexus, this Court is of the view that prevailing Seventh Circuit law establishes that the evidence offered here is sufficient to support the conviction. Indeed, the natural gas connection alone suffices to supply the interstate commerce element.

In *United States v. Stillwell*, 900 F.2d 1104 (7th Cir. 1990), defendant argued that the residence he was accused of torching was not "used in interstate or foreign commerce" or "in an activity affecting interstate or foreign commerce" as required by the statute because, as stipulated at trial, "the only nexus between Stillwell's house and interstate commerce was that Northern Illinois Gas Company supplied Stillwell's house with natural gas it obtained from sources outside the State of Illinois." *Stillwell*, 900 F.2d at 1106. Noting that "[t]his court has considered, but left open, the question whether the supply of interstate natural gas alone satisfies the arson statute's commerce requirement," the Seventh Circuit held that it "believe[d] Congress intended § 844(i) to reach a private residence which is supplied with natural gas." *Id.*, at 1107.

Later, in *United States v. Hicks*, 106 F.3d 187 (7th Cir. 1997), a case involving the burning of a restaurant that received natural gas, the Seventh Circuit reaffirmed its view of just how far the statute reaches. The court wrote that "the noncommercial character of the torched building

building strikes us as irrelevant" and that "the supplying of gas to private homes is a major interstate activity, and its potential disruption by arson is therefore a legitimate matter of federal concern." *Id.* at 189. The court also wrote:

> The jury question is whether the transaction in issue involved or affected commerce; for that is the commerce element in the statute, as distinct from the constitutional precondition to the statute's being valid. Because the arson statute was intended to exert Congress's full power under the commerce clause to prevent arson...all the jury in our case had to find was a slight effect on interstate commerce, since, as we have explained, that is all that is necessary to bring the aggregation principle into play. The judge instructed the jury that 'the government need only establish a minimal connection between the property at issue and some aspect of interstate commerce.' That is correct. And the burden that this formulation places on the government was carried.

Id. at 190.

Given the holding in *Stillwell* and the language in *Hicks*, it is clear that the motion for judgment of acquittal must be denied. While defendant makes an interesting argument that the evidence did not show any harm to the natural gas supplier, it would not appear that that is required under present Seventh Circuit case law.

Conclusion

On the basis of the foregoing, defendant Dewey J. Jones' "Motion for Judgment of Acquittal Following Discharge of Jury" filed June 23, 1998 is DENIED.

SO ORDERED this 27 day of July 1998.

William C. Lee, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
Northern District of Indiana
Fort Wayne Division

UNITED STATES OF AMERICA

v.

DEWEY J. JONES

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:98-cr-16

Patrick J. Arata 219/424-1010
Defendant's Attorney

The Defendant: TLN

( ) pleaded guilty to count(s) _____.
( ) pleaded nolo contendere to count(s) _____ which was accepted by the court.
(X) was found guilty on counts 1, 2 and 3 after a plea of not guilty.

E

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:844(I); 18:2	Damage/ Destruction by means of fire and explosive devices, real property used in interstate commerce; aiding & abetting	2/26/98	1
18:924(c); 18:2	Use of Molotov Cocktail during crime of violence; aiding & abetting	2/26/98	2
26:5861(f)	Unlawful making a firearm (Molotov cocktail)	2/26/98	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) _____.
( ) Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 365-84-1943

Defendant's Date of Birth: 12/13/72

Defendant's USM No.: 05411-027

Defendant's Mailing Address:

18150 Patton Street
Detroit, Michigan 48219

Defendant's Residence Address:

defendant incarcerated

AUGUST 26. 1998
Date of Imposition of Sentence

Signature of Judicial Officer

WILLIAM C. LEE, CHIEF JUDGE
Name & Title of Judicial Officer

AUGUST 26. 1998
Date

Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred twenty (420) months, consisting of sixty (60) months on Count 1, forty-six (46) months on count 3, to run concurrently, and three hundred sixty (360) months on Count 2, to run consecutively to count 1 and 3.

( ) The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at _____ a.m./p.m. on _____.
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

( ) before 2 p.m. on _____.
( ) as notified by the United States Marshal.
( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ a

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

Judgment--Page 3 of

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years Count 2 and three (3) years on each of counts 1 and 3, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to or drug test within 15 days of release fro n imprisonment and at least two periodic drug tests thereafter, as directed b the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defenda poses a low risk of future substance abuse.

(X) The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that th defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised releas in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

While defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, sta or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and comple written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or oth acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcot or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted a felony unless granted permission to do by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of an contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement office
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without th permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's crimin record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm th defendant's compliance with such notification requirement.

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Defendant: DEWEY J. JONES
Case Number: 1:98-CR-16-1

Judgment--Page 5 of

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule payments set forth on Sheet 5, Part B.

Count	Assessment	Fine	Restitution
1	$100.00	waived	$77,386.87
2	$100.00	waived	
3	$100.00	waived	

( ) If applicable, restitution amount ordered pursuant to plea agreement $ _____

Totals:	$ 300.00	$ waived	$ 77,386.87

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the da of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default an delinquency pursuant to 18 U.S.C. § 3612(g).

( ) The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

( ) The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offense committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination

( ) The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwis in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
American Family Ins.	$77,386.87	$77,386.87	
Totals:	$77,386.87	$77,386.87	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses commit on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost o: prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A (X) ASSESSMENT in full immediately; or

B (X) RESTITUTION payments shall be made from any wages the defendant may earn in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

C ( ) not later than _____; or

D ( ) in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ( ) in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

( ) The defendant shall pay the costs of prosecution.

( ) The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

STATEMENT OF REASONS

(X) The court adopts the factual findings and guideline application in the presentence report.

OR

( ) The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 21

Criminal History Category: III

Imprisonment Range: 46 to 57 months on each of counts 1 and 3 (mandatory minimum 60 months on count 1, by statute)
30 years statutory mandatory minimum on Count 2

Supervised Release Range: 3 to 5 years

Fine Range: $7,500 to $75,000

(X) Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $77,386.87

( ) Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashionin of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

( ) For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18 restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amoun of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable futur under any reasonable schedule of payments.

( ) Partial restitution is ordered for the following reason(s):

(X) The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from th sentence called for by the application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s)

OR

( ) The sentence departs from the guideline range:

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following specific reason(s):

ADDITIONAL CONDITIONS OF SUPERVISION

The defendant shall participate, under a co-payment plan, in a drug aftercare treatment program which may include urine testing at th direction and discretion of the probation officer. As part of the co-payment program, the defendant will be held responsible for 3% pe $100.00 of his net wages as determined by the probation office. If the defendant is unemployed or receiving public assistance, the defendan will be held responsible for a co-payment of $10.00 per month. Payments are to be made on a per visit basis.

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

RECEIVED
HAND DELIVERED
AUG 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 13th day of August, 1999, one copy of the Motion for Leave to Proceed In Forma Pauperis and one copy of the Declaration in Support of Motion for Leave to Proceed In Forma Pauperis in the above-captioned case were served by hand delivery on the following counsel for the United States of America:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served have been served.

DONALD M. FALK
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

IN THE
SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

RECEIVED
HAND DELIVERED
AUG 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Donald M. Falk, counsel for Dewey J. Jones, and a member of the Bar of this Court, hereby certify that on this 13th day of August, 1999, one copy of the Petition for a Writ of Certiorari in the above-captioned case was served by hand delivery on the following counsel for the United States of America:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served have been served.

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SHARON SWINGLE
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sswingle@mayerbrown.com

MAIN TELEPHONE
202-263-3000
MAIN FAX
202-263-3300

August 13, 1999

VIA MESSENGER

The Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Dewey J. Jones* v. *United States of America*, No. _____

Dear Mr. Suter:

I am enclosing for filing one original and eleven copies of a Petition for Certiorari in the above-captioned case, as well as one original and eleven copies of petitioner's Motion for Leave to Proceed In Forma Pauperis and Declaration in Support of Motion for Leave to Proceed In Forma Pauperis, attached to the original and copies of the petition. Please date stamp the extra copies of the petition, motion, and declaration in support of the motion, and return them to the messenger.

Thank you for your consideration of this matter.

Very truly yours,

Sharon Swingle

Enclosures
cc: All Counsel

CHICAGO BERLIN CHARLOTTE COLOGNE HOUSTON LONDON LOS ANGELES NEW YORK WASHINGTON
INDEPENDENT MEXICO CITY CORRESPONDENT: JAUREGUI, NAVARRETE, NADER Y ROJAS
INDEPENDENT PARIS CORRESPONDENT: LAMBERT & LEE